Filed 2/11/04 Gresean Industries v. Biesse Group America CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GRESEAN INDUSTRIES, INC.,	
Plaintiff and Respondent,	G031375
v.	(Super. Ct. No. 01CC02766)
BIESSE GROUP AMERICA,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Ronald E. Wiksell for Defendant and Appellant.

Law Offices of Douglas J. Pettibone and Douglas J. Pettibone for Plaintiff and Respondent.

* * *

Defendant Biesse Group America appeals from a $60,000 judgment for breach of contract in favor of plaintiff Gresean Industries, Inc. It contends plaintiff was not the real party in interest, there was no substantial evidence of consideration for the

contract, and the judgment for consequential damages was barred by the contract. None of these claims persuade and we affirm.

FACTS

Plaintiff, a commercial woodworking company, entered into a contract to purchase two industrial routers from defendant. Defendant agreed to install the equipment, including software, to operate the routers. Plaintiff arranged to finance the purchase through an equipment leasing company.

The routers were to be networked into plaintiff's office computer system. Plaintiff contemplated being able to program the routers from its computers rather than having to program the machines directly, thereby streamlining its operation. Based on information from defendant, plaintiff expected installation of the routers to be completed within two weeks, "[a]t the outside."

Upon delivery of the first router in November, defendant was unable to install the software to make it operational. After several software patches and fixes, the router finally did work, but nowhere near its capability. For example, work that took all day using the new software would have been processed "[i]n about 35 seconds" with plaintiff's old equipment.

Defendant then installed at least two different software systems in an attempt to make the router work. Although the router operated to some degree using the substitute software, it never produced the optimum amount of products. It operated for only about 30 minutes per day. Plaintiff was never able to manufacture any of its standard products; it made only a few specialized pieces.

Defendant offered a $20,000 discount from the $295,000 purchase price to compensate plaintiff for the delays and losses. Plaintiff asked to think about it; a few days later when it agreed to accept that discount, defendant refused, noting that because

the exchange rate had changed, it would lose $15,000. Plaintiff then purchased a used machine, and defendant picked up the router from plaintiff's premises.

Plaintiff filed suit, alleging several causes of action, including fraud, breach of contract, and breach of express and implied warranties. The jury returned a special verdict in favor of plaintiff for $60,000 for breach of contract. The court tried the rescission affirmative defense. It found defendant had not met its burden of proof, and issued a statement of decision on that issue. Defendant filed a motion for judgment notwithstanding the verdict, raising the same claims that are the subject of this appeal; the court denied the motion.

DISCUSSION

Plaintiff Is the Real Party in Interest

Defendant contends plaintiff is not the real party in interest because a leasing company, not plaintiff, was to be the purchaser of the equipment. We disagree.

The real party in interest is the person holding the right to sue under substantive law. (*Gantman v. United Pac. Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566.) Here, that is plaintiff. Plaintiff entered into the contract with defendant to purchase the equipment, and plaintiff was the party damaged by the defective equipment. Use of the leasing company was merely a financing device (see *U. S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1445-1453) and gave the leasing company no substantive rights against defendant.

No Failure of Consideration

Defendant argues the judgment must be reversed based on failure of consideration. It relies on the court's finding that plaintiff never paid defendant for either of the routers. The contract required plaintiff to pay defendant "no later than 5 days from

the date of the installation of the machines if the installation [was] provided by [defendant]." Here, the record reflects installation was never properly completed.

Defendant points to BAJI No. 10.82 where the jury was instructed that "[i]f one party materially fails to perform [its] promise, or materially delays performance, the other party's duty is discharged [or] ended." Because defendant failed to deliver and install a working router, plaintiff's duty to pay was discharged. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 757, 758, pp. 688-689.) The only failure of consideration was defendant's.

Award of Damages Proper

Defendant challenges the damages award on the ground the contract excluded recovery of consequential damages. We are not persuaded.

A buyer's consequential damages are defined as "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . ." (Cal. U. Com. Code, § 2715, subd. (2)(a).) Defendant cites to nothing in the record to show the jury's award constituted consequential damages. Nor does it provide us with legal authority or reasoned argument in support of its claim. Thus, we treat the issue as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Further, the purchase order for the routers stated: "It is expressly agreed that [plaintiff] shall have no right of recovery against [defendant] or any incidental or consequential damages arising from any breach of warranty by [defendant] . . . ." Here, the jury verdict was on the breach of contract cause of action, not a claim for breach of warranty. Although breach of warranty is a form of breach of contract, the two are not wholly synonymous. (See *A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 152-153.) Nothing in the record limits the type of damages for breach of contract.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.